court below nor this court is called upon to consider these matters, although the point of law referred to in paragraph 2(3) of the memorandum of appeal might appear to raise them.

In my judgment, the question for the opinion of the court should be answered in the negative for the reasons I have indicated. As the court below did answer the question in the negative, albeit for different reasons, I would dismiss the appeal with costs to the respondent.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Rodyk & Davidson*; *Allen & Gledhill.*

RE EASTERN MINERALS & TRADING (1959) LTD.

[O.C.J. (Ambrose J.) August 25, 1964]

[Singapore — Companies Winding-up No. 1 of 1964]

Company law — Winding-up — Company incorporated in Federation of Malaya — Companies Ordinance (Cap. 174), s. 295 (1) and (2).

This was a judgment creditor's petition under section 295(2) of the Companies Ordinance for the winding-up of a company incorporated in the Federation of Malaya. The debt alleged in the petition was said to be the balance due on a bill of costs taxed pursuant to a judgment obtained against the debtor company.

Held: (1) section 295(2) of the Companies Ordinance is merely expository and does not give the court an additional enabling power to make a winding-up order;

(2) on the authority of *Re Langham Skating Co.*(3) and *Re Wear Engine Works Co.*(4) the petition should be dismissed as it did not allege a ground for winding-up within section 295(1)(b) of the Companies Ordinance.

Cases referred to:—

(1) *Russian & English Bank* v. *Baring Brothers* [1936] 1 All E.R. 505 at p. 516.

(2) *Banque de Moscou* v. *Kindersley* [1950] 2 All E.R. 545 at p. 560.

(3) *Re Langham Skating Rink Company* (1877) 5 Ch. D. 669.

(4) *Re Wear Engine Works Co.* (1875) 10 Ch. App. 188.

(5) *Re Crigglestone Coal Co. Ltd.* [1906] 2 Ch. 327 at p. 332.

COMPANIES WINDING-UP.

K. E. Hilborne for the petitioning creditor.

T. Q. Lim for the debtor company.

Goh Heng Leong for 3 creditors.

Po Guan Hock for a secured creditor.

Ambrose J.: This was a petition for the winding-up of Eastern Minerals & Trading (1959) Ltd., a company incorporated in the Federation of Malaya, by Tong Aik (Far East) Ltd. a judgment creditor. The debt alleged in the petition is a sum of $7,504.80, which is said to be the balance due on a bill of costs taxed pursuant to a judgment obtained against the debtor company.

The petition was presented under section 295(2) of the Companies Ordinance (Cap. 174), as appears from the heading of the amended petition. Section 295(2) provides as follows:

"Where a company incorporated outside the Colony which has been carrying on business in the Colony ceases to carry on business in the Colony, it may be wound up as an unregistered company under this Part of this Ordinance, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

This subsection corresponds to section 91 of the Companies Act, 1928, which was subsequently re-enacted as section 338(2) of the Companies Act, 1929. Section 338(2) of the Act of 1929 provides as follows:

"Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.'

According to the observations of Lord Atkin in *Russian & English Bank* v. *Baring Brothers,*(1) section 338(2) was introduced into the Act of 1929 for the removing of doubts and to make it clear that the words "if the company is dissolved" in section 338(1)(d)(i) were meant to apply to an incorporated company dissolved according to the law of its constitution: and not intended to give a new enabling power only applicable to a company which should cease to carry on business after the passing of the Act. Section 338(1)(d) of the Act provides as follows:

"Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:

. . . . . .

(d) The circumstances in which an unregistered company may be wound up are as follows:—

(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business or is carrying on business only for the purpose of winding up its affairs;

(ii) If the company is unable to pay its debts;

(iii) If the court is of opinion that it is just and equitable that the company should be wound up."

In *Banque de Moscou* v. *Kindersley,*(2) at page 560, Evershed M.R. observed as follows:

"It follows, in my judgment, that sub-section (2) of section 338 must be regarded as expository only, and as not having been intended to give jurisdiction to wind up dissolved foreign corporations subject to special limiting conditions not applicable to the more general jurisdiction conferred by sub-section (1);"

In the light of these observations it seems clear to me that section 295(2) of the Companies Ordinance is merely expository and does not give the court an additional enabling power to make a winding-up order.

The jurisdiction to make winding-up orders in the case of unregistered companies is to be found in section 295(1). This subsection provides as follows:

"Subject to the provisions of this Part of this Ordinance, any unregistered company may be wound up under this Ordinance, and all the provisions of this Ordinance with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:—

. . . . . .

(b) the circumstances in which an unregistered company may be wound up are as follows:—

(i) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(ii) if the company is unable to pay its debts;

(iii) if the court is of opinion that it is just and equitable that the company should be wound up;"

What is an unregistered company? Section 294 of the Companies Ordinance provides as follows:

"For the purposes of this Part of this Ordinance the expression 'unregistered company' shall include any partnership, any association and any company with the following exceptions:—

(1) a company registered under any former Ordinance or under this Ordinance;

(2) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association or company;

(3) a Society duly registered under the provisions of the Co-operative Societies Ordinance."

In my opinion the effect of this section is that the requirement that an unregistered company should consist of at least eight members in order that it could be wound up does not apply to a foreign company; and that any foreign company irrespective of the number of its members is an unregistered company. It follows that the Eastern Minerals & Trading (1959) Limited having been incorporated in the Federation of Malaya is an unregistered company.

The petition does not allege a case for winding up within section 295(1)(b) of the Companies Ordinance. In *Re Langham Skating Rink Company* [3] Jessel M.R. held that if a petition does not state a case which could authorize the court to make a winding-up order, no order at all ought to be made upon it except to dismiss the petition. In *Re Wear Engine Works Co.* [4] a winding-up order was refused on the ground that the winding-up petition did not allege facts which would justify a winding-up order. On the authority of these two cases I dismissed the petition as it did not allege a ground for winding-up within section 295(1)(b) of the Companies Ordinance.

Counsel for the petitioning creditor applied for leave to amend the petition by adding to paragraph 6 of the petition the words, "The company is unable to pay its debts.". This application was refused.

If I had allowed the application for leave to amend the petition, I think I would have dismissed the petition for these reasons. It was not disputed that on the 29th July, 1961, the debtor company issued a debenture secured by a floating charge upon its undertaking and all its property to Lee Wah Bank Ltd. to secure its overdraft; and that upon the making of a winding-up order the floating charge would crystallize. According to the balance sheet of the debtor company as at 31st December, 1963, the amount then owed to the bank was $420,639.67. If a winding-up order was made, it seemed to me more probable than not that the assets of the debtor company might realize considerably less than the sum of $600,000, which was the purchase price mentioned in negotiations by a certain mining syndicate interested in obtaining an option for six months to purchase the assets; and that there might be nothing left for unsecured creditors after satisfying the debenture-holder. But that by itself was not a sufficient ground for refusing to make a winding-up order. Section 169(1) of the Companies Ordinance provides:

"the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

It seemed to me that the principle to be observed was that expressed by Buckley J. in *Re Criggle-stone Coal Co. Ltd.*,[5] at page 332:

"the court does not make an order (i.e. a winding-up order) when no benefit can result. If the order will be useful (not necessarily fruitful) there is jurisdiction to make it."

It was argued by counsel for the petitioning creditor that, even if a winding-up order would not be fruitful, it would be useful, as it would enable the petitioning creditor to attack the debenture. It was said that the debenture was good only to the extent of $320,000, because the first clause of the debenture stated that the consideration for the debtor company undertaking to pay to the bank the moneys mentioned in that clause was that the bank had agreed to grant accommodation to the company and other overdraft facilities on its current account with the bank to an amount not exceeding $320,000. It seemed to me that there was no substance in this argument as the company undertook to pay "all such moneys as are now or shall from time to time hereafter become owing to the bank from

the company on the balance of its current account with the bank or otherwise etc."; and also as in the second clause of the debenture the company charged its undertaking and all its property with the payments referred to in the first clause by way of floating charge. Another point was raised in connection with the signing of the debenture, but was answered to my satisfaction by counsel for the debtor company. I came to the conclusion that a winding-up order would not be useful in any way and that no benefit would result from it, and that therefore no winding-up order should be made. Furthermore, it seemed to me that if an option to purchase the company's assets was given to the mining syndicate and the mining syndicate eventually bought the assets for the agreed price of $600,000, the unsecured creditors would benefit from the surplus left after payment of the amount due to the debenture-holder.

Counsel for the petitioning creditor suggested that the wishes of the other unsecured creditors should be ascertained. But I thought that this was unnecessary as it was clear to me that no benefit would result to them from the making of a winding-up order.

Although the ground on which I dismissed the petition was that it did not allege a case for winding up within section 295(1)(b) of the Companies Ordinance, I took the view that it would be unfair to order the petitioning creditor to pay the costs of the debtor company, the debenture-holder and three other creditors, and I therefore made no order as to costs.

Petition dismissed.

Solicitors: *Hilborne, Chung & Co.*; *Braddell Bros.; Allen & Gledhill; Wee Swee Teow & Co.*

UNITED MALAYAN INSURANCE CO. LTD. v. LEE YOON HENG

[O.C.J. (Gill J.) September 11, 1964]

[K.L. — Civil Suit No. 53 of 1963]

Insurance — Policy of Insurance — Non-disclosure of material facts — Road Traffic Ordinance, 1958 s. 80(3).

This was a suit for a declaration under section 80(3) of the Road Traffic Ordinance, 1958, that the policy of insurance issued by the plaintiff company to the defendant in respect of a motor vehicle was void for non-disclosure of material facts. In the insurance proposal form the purpose for which the vehicle was to be used was stated as "Private". It appeared however that the motor vehicle was used for the purpose of the defendant's business and not as a private passenger vehicle.

Held: the plaintiffs were entitled to avoid the policy on the ground that it was obtained by non-disclosure of material fact or by a representation of fact which was false in some material particular.

CIVIL SUIT.

Henry B. H. Cheah for the plaintiffs.

V. K. Palasuntharam for the defendent.

Cur. Adv. Vult.

Gill J.: This is a suit for a declaration under section 80(3) of the Road Traffic Ordinance, 1958 that the policy of insurance issued by the plaintiff company to defendant in respect of motor vehicle BD 862 is void for non-disclosure of material facts.

The defendant bought the motor vehicle from Eu Tong Sen Finance (M.) Ltd. of Kuala Lumpur on hire-purchase. He signed the hire-purchase proposal form, and the acceptance of the proposal was signed by one Wong Peng Wah on behalf of the finance company, on 8th December, 1960. The motor vehicle was then lying in front of the office of the finance company and it was described in the hire-purchase proposal form as a Volkswagen "Station Wagon". This proposal form was filled in by Wong Peng Wah who apparently entered the description of the motor vehicle in the form on his own initiative, but the defendant furnished the particulars about his identity card, his driving licence, his address and his business or occupation. His occupation was entered as that of an advertiser.

After the hire-purchase proposal form had been signed, Wong Peng Wah suggested to the defendant to take out an insurance policy in respect of the motor vehicle from a company of which Eu Tong Sen Finance (M.) Ltd. were the agents. The defendant agreed and asked Wong Peng Wah to fill in the proposal form for insurance, which he subsequently signed. He now says that he does not know English and that Wong Peng Wah, before filling in the form, did not ask him what type of body the vehicle had but saw the vehicle himself. He further says that, apart from the driver's seat, there were two rows of seats inside the vehicle for persons to sit on. Those two rows of seats were there when the insurance proposal form (P.2) was signed. The seats could be taken out.

Under the column headed "make of vehicle and type of body" in the insurance proposal form the words filled in were "Volkswagen Station Wagon", and in answer to the question, "State clearly for what purpose the above vehicle is to be used", was the word "Private". As I have stated above, this insurance form was filled in by Wong Peng Wah who represented the Finance Company from whom the vehicle was obtained on hire-purchase and who were also the insurance agents for the plaintiff company. On 10th December, 1960 the plaintiffs issued a policy of insurance numbered as MC/02018, whereby they agreed, *inter alia*, and subject to the conditions and exceptions therein set out, to indemnify the